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No. 92-148

In The

Supreme Court of the United States

October Term, 1992

DAVID CALHOUN, CHRISTINE CALHOUN, RONALD DALZELL, PHILLIP RINEHARDT, and KEVIN MAY, In Their Individual Capacities,

Petitioners,

vs.

JOSEPH SENK and PATRICIA SENK,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Rex W. Post
113 St. Clair Avenue, Suite 375
Cleveland, Ohio 44114
(216) 696-2118

Attorney for Respondents

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 1

ARGUMENT 6

I. THE QUESTION PRESENTED FOR REVIEW DOES NOT ARISE FROM THE FACTS OF THIS CASE 6

II. THE ALLEGATIONS AND SUPPORTING EVIDENCE PRESENTED BY RESPONDENTS WERE IN CONFORMITY WITH THE STANDARD ENUNCIATED IN *ANDERSON V. CREIGHTON*, 483 U.S. 635 (1987) 16

III. THE STANDARDS SET FORTH IN THE CASES CITED BY PETITIONERS DO NOT APPLY TO THE FACTS OF THIS CASE 26

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES:

Anderson v. Creighton, 483 U.S. 635 (1987) 17, 20, 21, 24, 27

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) *passim*

Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970).....8, 9

Allstate Ins. Co. v. Cannon, 644 F.Supp. 31 (E.D. Mich. 1986)..... 9

Brandenburg v. Cureton, 882 F.2d 211 (6th Cir. 1989).... 25

Graham v. Connor, 490 U.S. 386 (1989).18, 19, 20, 24, 28

Hunter v. Bryant, 112 S.Ct. 534 (1991) 26, 27, 28

Lewis v. Downs, 774 F.2d 711 (6th Cir. 1985)..... 20

Mitchell v. Forsyth, 337 U.S. 541 (1949) 11, 27

Molton v. City of Cleveland, 839 F.2d 240 (6th Cir. 1988)..... 20

Russo v. City of Cincinnati, 953 F.2d 1036 (6th Cir. 1992)..... 25

Siegert v. Gilley, 111 S.Ct. 1789 (1991) 29

Tennessee v. Garner, 471 U.S. 1 (1985).....7, 18, 23

United States v. Diebold, Inc., 369 U.S. 654 (1962)..... 8

United States v. Various Slot Machines, 658 F.2d 697 (9th Cir. 1981)..... 9

Yates v. City of Cleveland, 941 F.2d 444 (6th Cir. 1991).....24, 25

UNITED STATES CONSTITUTION:

U.S. Constitution, Amendment IV..... 1, 2, 24

TABLE OF AUTHORITIES – Continued

Page

UNITED STATES CODE:

42 U.S.C. Section 1983 .....1, 28

FEDERAL RULES OF CIVIL PROCEDURE:

Fed. R. Civ. P. 56 .....7, 8, 9

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. Section 1983 provides in pertinent part as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . .

STATEMENT OF THE CASE

Petitioners have set forth an adequate procedural statement of this case. However, because their Argument is essentially factual in nature, elaboration is necessary here to correct numerous inaccuracies and omissions in the factual portion of their Statement of the Case.

In this civil rights action, which was brought pursuant to 42 U.S.C. Section 1983, the respondents, Joseph Senk and Patricia Senk allege, *inter alia*, that the five petitioner police officers used excessive force during their arrest of Mr. Senk on May 12, 1990 in violation of the

Fourth Amendment to the United States Constitution and 42 U.S.C. Section 1983.

Following limited discovery in the case, petitioners moved for summary judgment on the issue of qualified immunity. The District Court denied their motion. *See* Order, United States District Court, Northern District of Ohio, Eastern Division, Case No. 90-CV-1699, reprinted in the Appendix to Petition for Writ of Certiorari (hereinafter referred to as "Appendix") at 10a. The District Court's denial of petitioners' motion for summary judgment was affirmed by the Sixth Circuit Court of Appeals on April 22, 1992. *See* Judgment Entry, United States Court of Appeals for the Sixth Circuit, Case No. 91-3823, also reprinted in the Appendix to the Petition for Writ of Certiorari at 1a.

The facts are well supported that on Saturday, May 12, 1990 the respondents, Joseph and Patricia Senk, had been engaged in an argument that turned physical in the driveway area outside of their home during which Mrs. Senk was grabbed about the neck and collarbone. Also, and as a result of a combination of a push from her husband and slippage on the muddy driveway, Pat Senk fell into her vehicle and injured her side. Although she experienced pain and hysteria, she had no lacerations or bruises. It is clear as well that Mr. Senk had not struck her and no medical treatment was required.

Almost immediately after the brief altercation between Mr. and Mrs. Senk ended, two of the petitioner police officers arrived at the residence. The second officer arriving at the time, David Calhoun, immediately directed his attention to Joseph Senk. Upon seeing the approaching officer and reasonably believing that he was about to be placed in custody, Mr. Senk stood up with his

hands held out in front of him to be handcuffed and the officer did so. It is undisputed that Mr. Senk was completely calm and offered no resistance whatsoever as he was escorted by the officer to the police cruiser and placed in the rear seat.

Upon David Calhoun's return, petitioner Dalzell informed him and the other two petitioners who had just arrived of his decision to charge Joseph Senk with domestic violence. It was also decided that Patricia Senk was to be sent to a local hospital for examination.

About ten minutes after being placed in the cruiser, three things occurred almost simultaneously that triggered Joseph Senk's anger. First, he saw two police officers invade his home and he shouted at them repeatedly to get out. At that same time, or very close thereto, and as three other officers positioned themselves around the car in preparation for the arrest, petitioner Dalzell stuck his head inside the front door of the cruiser to tell him "to shut your ___ mouth" and that he was under arrest. Most importantly, and as those things had just occurred, he saw his wife being taken by emergency medical technicians to an ambulance on a backboard with a C-collar. Prior to that time he did not think that his wife was hurt so he was understandably panicked and very much concerned and wanted to be with her. In a fit of frustration about his confinement and inability to be with his wife, he then broke the side window of the car with his feet.

Prior to the time that the window was broken, and with the possible exception of the inappropriate manner in which Mr. Senk was informed of his arrest, there were no serious violations of proper police procedure. Beginning at the point in time that the window was broken, however, all appropriate and proper police procedure

ceased. As one eyewitness summed up the conduct of the police that was to follow: "there should be a way that these people can subdue you without killing you."

The subduing of Joseph Senk began as he exposed his head, shoulders and hands through the open window. At that point, there were four police officers immediately outside of the door who clearly could have restrained him without the use of weapons or deadly force. Mr. Senk, after all, was handcuffed, unarmed, and vastly outnumbered by four police officers; every one of which weighed at least 200 pounds or more. Moreover, every officer present was specially trained in arrest techniques and unarmed restraint.

Without making any attempt whatsoever to physically subdue him without the use of weapons or violence, and after yelling "___ damn it, Joe, you really ___ up now", petitioner David Calhoun immediately and violently struck Joe Senk on the head and forehead three times in rapid succession "with a big damn flashlight . . . one of those big things, what, four or five cell flashlights . . . ", according to a witness who was observing this conduct, unobstructed and in very good lighting conditions, some four feet away. At that point Joe fell back into the cruiser and he appeared to be "in excruciating pain" and "half out of it".

Immediately after Joseph Senk was beaten on the head with the weapon, an officer opened the cruiser door at which time one of the witnesses thought he was going to "check and see if he was dead or something". Mr. Senk looked at the time "like he was dazed or like he wasn't, you know, he wasn't sure he was with it." Contrary to what the witness thought, though, the police immediately and without pause, grabbed their suspect, pulled him out

of the car, locked his arms, one on each side, and began punching him with their fists. This went on for several minutes until one of the officers knocked his feet out from under him.

At no time during the period that he was pulled from the car until he was rendered unconscious did Joseph Senk's arms ever get free. Joseph Senk's affidavit and testimony, as well as the testimony of other witnesses, make clear that at no time during the entire sequence of events did he: threaten the life of any police officer; attempt to grab any officer's gun or gunbelt; punch or attempt to punch anyone; or try to escape.

By all accounts, the most that can be said of Mr. Senk's actions from the time that he broke the vehicle window until he was rendered unconscious was that "it might very well be a matter for resisting arrest, which is a misdemeanor, but it did not rise to the level of escape". Nor was he "fighting" where every petitioner used the term "thrashing" to describe his actions. In fact, one of the witnesses insists that he was just trying to cover up and defend himself from the beating.

After Joseph Senk was forced to the ground and held on his back by four officers while handcuffed, "this big woman came flying over there with a nightstick . . . [and] leaped on him", after which, "she threw one knee over on the cement, and she had her other knee somewhere in his chest someplace, and she had the stick holding him down, the stick was up against his throat". Her hands were 12 to 18 inches apart on the nightstick and her elbows were locked. When asked whether or not she was putting any pressure on the nightstick, the witness replied: "Well, you could hear Joe gurgling, she had all her weight – you know how you get down for a football

stance, she looked like she was in a football stance. I thought she was killing him right there."

According to Joseph Senk, he recalled that at the time before going into unconsciousness he was "Just trying to gasp for air, just trying to get under the cruiser because of being choked, and I couldn't breathe, and that was it."

These observations were further corroborated by another witness who stated that "it looked to me as if she had one knee buried in the center of his chest". When asked if she had him by the throat at that time, the witness, Michael Lucas, replied: "She had him right there without a doubt." When the police officer removed her nightstick from Mr. Senk's throat and herself from his chest, one of the witnesses remarked "You didn't hear no more from Joe . . . I thought he was dead then".

He was indeed very close to death. When the petitioners had finished with him, Joseph Senk was unconscious and in respiratory distress. Minutes later, his system went into arrest and he lapsed into a coma for more than five weeks. After more than three and one-half months in a hospital he was finally released suffering blindness, severe brain damage, loss of the use of one arm and other serious physical injuries and mental conditions. His condition has not improved significantly through the present date.

ARGUMENT

I. THE QUESTION PRESENTED FOR REVIEW DOES NOT ARISE FROM THE FACTS OF THIS CASE.

Without question, it is well settled that unspecific, self-contradictory, and/or implausible evidence, without more, is insufficient to defeat a motion for summary

judgment under Rule 56 of the Federal Rules of Civil Procedure. Contrary to the petitioners' claims, however, the record is clear that the District Court and the Court of Appeals in this case were presented with competent and probative evidence by respondents on the issues raised herein. Accordingly, the denial of their motion for summary judgment was well supported and proper in all respects. Further review by this Court is therefore unnecessary.

The petitioners begin in their argument with the contention that the testimony provided by respondents on the issues of whether Joseph Senk threatened the lives of two officers and attempted to grab their gunbelts was not genuine for two reasons. First, it is claimed that Mr. Senk was incapable of recalling his actions after an episode of post-concussion syndrome.[1] Next, it is theorized that a

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[1] Throughout the Petition, petitioners greatly exaggerate the manifestations and relevance of Joseph Senk's post-concussion syndrome. Indeed, they devote two pages in their Statement of the Case to embellished discussions about "episodes" that occurred many years before the incident that is the subject of this case. *See* Petition at 2-4. Numerous references and unsupported suppositions are also made about the condition throughout their Arguments.

The fact of the matter with respect to this syndrome and any episodes that Mr. Senk may have experienced in years past is that they are wholly irrelevant and prejudicial to the issues of this case.

The proper focus in inquiries involving the doctrine of qualified immunity is on the totality of all the facts and circumstances known to the officers at the time of the arrest. *See, e.g., Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985). Four of the five police officers admitted that they did not know Joseph Senk or anything about him prior to the arrest on May 12, 1990. The fifth stated that he only knew of Mr. Senk in high school (some

witness to the various occurrences could not have heard the threats that were supposedly made by Mr. Senk because of the commotion at the time. Both of these allegations, though, were not found to be persuasive by the two lower courts that reviewed the lengthy record.

Rule 56(e) of the Federal Rules of Civil Procedures provides, in pertinent part, as follows:

> When a motion for summary judgement is made and supported as provided in this rule, an adverse party may not rest on the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

In reviewing a motion for summary judgment, a court is required to consider the pleadings, related documents, evidence and ". . . the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). Any ambiguities in the record are also to be resolved in favor of the party opposing the motion. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970). The District Court correctly noted in its review that the ultimate burden, however, was with the respondents herein, Joseph and Patricia Senk, to show the existence of genuine issues of material fact and the Court of Appeals affirmed the propriety of the use of that standard. Appendix at 2a, 17a. The respondents were thus required to come forward in their opposition to the petitioners' motion with "specific facts showing that there is

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thirteen years before the incident), but that he had not seen or heard about him since.

a genuine issue for trial." Rule 56(e), Federal Rules of Civil Procedure. It was found by both courts that this burden was met.

Petitioners correctly cite the principle that "[e]vidence that is too incredible to be accepted by reasonable minds does not raise an issue of credibility to defeat a motion for summary judgment." Petition at 14, *citing Allstate Ins. Co. v. Cannon*, 644 F.Supp. 31, 33, 34 (E.D. Mich. 1986). They go on in this vein by adding that "a court is not compelled to give weight to an allegation that is incontrovertibly demonstrated to be false." *Id., citing United States v. Various Slot Machines*, 658 F.2d 697, 701 (9th Cir. 1981). However accurate these statements of the law are, they are assuredly not applicable to the issues presented.

The petitioners first argue that Joseph Senk's denials that he threatened any officer or attempted to grab their gunbelts was not genuine because he was allegedly experiencing an episode of post-concussion syndrome at the time. Therefore, the argument goes, he could not have had any recollection of the events. Such a theory, however, is contrary to the general rule that "the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor". *Adickes*, 398 U.S. at 158-159. It is fundamental that the lower courts were not entitled to gauge the parties' credibility, as the petitioners would require. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

In advancing this theory about his inability to recall events at the time of the incident, petitioners rely solely on the following deposition testimony of Mr. Senk where the questions focused entirely upon his experiences with

episodes *before* being given medical treatment for the condition in 1979 or 1980:

> Q. You indicated earlier in this deposition that you at times had violent episodes that occurred, and that was the basis of your seeing Dr. Richard Schwartz, correct? That was one of the bases for you seeing Dr. Richard Schwartz?
>
> A. Yes.
>
> Q. Can you describe to me, if you remember, what occurs *immediately prior* to a violent episode?
>
> A. I have no idea.
>
> Q. Just something happens?
>
> A. That's it.
>
> (emphasis added).

It is not at all clear what counsel was seeking to elicit, but the responses certainly reveal nothing about whether Joseph Senk was able to recall the details of his arrest on May 12, 1990. Moreover, nothing more than the petitioners' supposition was offered on the issue of whether he was in fact experiencing an episode of post-concussion syndrome at the time of his arrest which was some twelve years after his industrial accident. On the contrary, the record before the Court of Appeals showed that Joseph Senk was able to accurately recall many of the details of his actions and the events that occurred throughout the course of the particular day and evening at issue.

The lower courts were correct in their review in light of the ruling that " . . . at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Liberty Lobby, Inc.*, 477 U.S. at 249. " . . . [S]ummary judgment will not

lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248. Certainly, Joseph Senk's sworn testimony is to be believed in the absence of a much stronger showing than was made by the petitioners that he was "apparently" suffering from an episode and therefore he was "apparently" unable to accurately recall the events. In such a situation, the reviewing court is to look at the plaintiffs' allegations and accept them as true. *Mitchell v. Forsyth*, 337 U.S. 541 (1949). This standard is especially applicable where a party's recollections are corroborated by an independent witness.

The petitioners next challenge the genuineness of the testimony of a witness to the events who supported Joseph Senk's version of the facts. They claim that the individual could not have heard the alleged threats due to the commotion at the time. The record before the lower courts, however, reveals that the witness, Mr. Paul Testa, was standing four feet away from the parties at the time. Surely, a jury could reasonably conclude that he would have heard Joseph Senk threaten an officer if such a threat was in fact made. After all, he heard the officer tell Senk: "___ damn it Joe, you really ___ up now. That's a brand new squad car." Mr. Testa further testified that he heard the noise, or "pops" from the flashlight against Joe Senk's head. It is entirely possible, therefore, that respondent Calhoun did not hear what he thought he heard in the "commotion".

The second issue of fact in the same sequence has to do with two of the petitioners' defenses that Joseph Senk grabbed their gunbelts and, here as well, they continue to argue that the accounts of Messrs. Senk and Testa are

implausible. The lower courts though, correctly exercised their discretion and found that the testimony was sufficiently plausible and credible to warrant a jury's consideration.

The lower courts' rulings on the issues presented are in complete accord with the Supreme Court's holding that:

> There is no requirement that the trial judge make findings of fact. The inquiry performed is the threshold inquiry of determining whether there is the need for a trial – whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.

Liberty Lobby, Inc., 477 U.S. at 250.

In Part I of their Argument the two defendants additionally claim that Mr. Senk lunged through the side window of the police cruiser and placed them in fear for their lives by grabbing their gunbelts. They maintain such positions despite their admissions that Senk's hands never touched their weapons and that their belts were grabbed, if at all, near the front and about six inches away from the guns. Further, and rather than groping to reach their guns, they each stated that Senk's grip was so tight that Calhoun had to hit him on the forearms with a flashlight and Dalzell had to punch him in the mouth to get free. Senk has testified under oath, however, that he did not grab any officer's gun or gunbelt or even attempt to do so.

At the time that Senk was said to have extended himself more than half of the way out of the cruiser

window and grab and hold onto two officers' belts, one at a time, so hard and long that they had to strike him and punch him to get free, three other persons were standing within a few feet of them in good lighting conditions. Not *one* saw any such things occur.

Even if Testa's attention was "momentarily diverted" in the time it took him to hand a wallet to someone standing next to him as petitioners claim, he would have seen something occur during all of these events if they in fact did. Moreover, David Calhoun did not even see Dalzell being grabbed by Senk. Surely then, a jury will assess the probability that at least one of all of those individuals in close proximity would have seen Joseph Senk grab and hold at least one of the officers' belts, if in fact he did. Strangely enough though, one Frank Guffin is the only person who claims that he saw an officer being grabbed around the waist. This "direct evidence", as petitioners term it, however, came from one of their co-defendants who was standing fifty feet away at the time in the dark. *See* Petition at 18.

Contrary to defendants' version, and from all indication, what happened was just as Testa and Senk testified. Just as Joseph Senk was exposed in the window of the cruiser with his hands near the door handle, Calhoun, without pause, began clubbing him violently on the head with a flashlight. The District Court also made note of the fact that even one of the other police petitioners supports this version in part where he acknowledged that Senk's hands were on the door handle instead of on someone's gunbelt. *See* Appendix at 13a-14a. Testa and the other officers did not, therefore, see Senk grab anyone's gunbelt for the simple reason that it didn't happen. It is thus

submitted that any implausibility regarding this defense of the petitioners too is in *their* version of the facts.

The third factual issue that is asserted under this heading has to do with whether Officer Calhoun struck Joseph Senk on the head with a flashlight. Contrary to what the petitioners represent, however, there is indeed a great deal of sound and credible evidence in support of the Senks' version and claims.

To begin, Joseph Senk's allegation that he was hit on the head was supported by the observations of Paul Testa who was, again, standing just four feet away at the time. Mrs. Senk too recalled in detail about her observations of her husband's condition at the hospital where she described "a mess of cuts and lumps" on his head and "a big bash over his eyebrow." The hospital records also verify her observations on this issue.

If there was any doubt as to the genuineness of the non-medical evidence, the lower courts reviewed supporting medical records evidencing a concussion and a report from a neurologist wherein he opined that Joseph Senk's severe brain damage and blindness were "due to head injury in relationship to the incident of May 12, 1990. The relationship is causal and related within a degree of medical *certainty*." (emphasis added).

In this particular argument Officer Calhoun claims that there is no genuine issue of material fact as to whether he struck Joseph Senk on the head with a flashlight. On the contrary, the courts below found and described a wealth of controverted facts from the testimony and medical evidence from which a jury can reasonably and easily conclude that Joseph Senk was violently beaten in the manner that he alleges. In such a situation, " . . . the judge must ask himself not whether he

thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented . . . The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict." *Liberty Lobby, Inc.*, 477 U.S. at 252. Clearly, numerous and genuine issues of material fact exist from which a jury can reasonably enter a verdict for the respondents on their claims.

Finally, and not surprisingly, petitioners make only brief mention of the dispute of fact surrounding the conduct of petitioner Chris Calhoun. Given the circumstances at the time of her actions, the level of force that she employed was without question the most outrageous and excessive level of violence employed during the arrest.

Before addressing her actions it must be pointed out that if the respondents' version of facts are found to be correct, at the moment that Joseph Senk was directed to the ground outside of the cruiser he was blind, suffering brain damage, semi-lucid and in excruciating pain from the blows to his head.

Whether or not Mr. Senk's handcuffs were broken at the time as petitioners infer is immaterial. The record is clear that as he was severely disabled and in such tremendous pain, four officers held him firmly on his back while this 220 pound officer thrust her knee repeatedly into his chest as she choked him across the throat with a nightstick with all of her might until he lapsed into unconsciousness and respiratory distress. If true, and there are many sound facts to conclude that it is, this officer's

conduct can only be characterized as outrageously excessive under circumstances where absolutely *no* force was called for.

It readily appears on the face of their decisions that the District Court and the Court of Appeals considered the genuineness of the many factual issues presented for review. Contrary to petitioners' representation, the courts below both explicitly found and recited many, many facts that were direct, probative and admissible in support of respondents' claims that excessive force was employed in violation of their civil rights.

"Given the sharp conflict in the evidence", the Court of Appeals held, "only a jury can decide whether the facts are as the officers say they are." Appendix at 6a. This ruling was in conformity with the Supreme Court's standard that "[T]he plaintiff, to survive the defendant's motion, need only present evidence from which a jury might return a verdict in his favor. If he does so, there is a genuine issue of fact that requires a trial." *Liberty Lobby, Inc.*, 477 U.S. at 257. Accordingly, petitioners' argument that there was insufficient evidence to create genuine issues of material fact is without merit and, as a consequence, this Court should not accept this argument for review.

II. THE ALLEGATIONS AND SUPPORTING EVIDENCE PRESENTED BY RESPONDENTS WERE IN CONFORMITY WITH THE STANDARD ENUNCIATED IN *ANDERSON V. CREIGHTON*, 483 U.S. 635 (1987).

In Part II of their Argument Petitioners accurately cite the principle that the right that an official is alleged to have violated must have been "clearly established" in a

particularized and relevant sense. Petition at 21, 22. However, they insist in their argument that such a showing has not been made by respondents and, also, that because the Court of Appeals did not specifically cite cases that were analogous to the facts of this matter, and then only one that pre-dated the arrest of Joseph Senk, there was an absence of clearly established law on the use of excessive force at the time. Their contentions are obviously mistaken and do not merit the attention of this Court.[2]

Throughout the proceedings in the lower courts it was alleged in a detailed fashion that the five police officers applied levels of force on three separate occasions during the arrest of Joseph Senk that were wholly excessive under the circumstances. So much force, in fact, that he was rendered comatose for more than five weeks and permanently disabled with blindness, brain damage, loss of the use of one arm and other very serious injuries. Such extreme levels of force were also convincingly shown to have been in response to only nominal resistance, or "thrashing" as it was described by the police, on the part of the respondent during his arrest. The allegations and supporting evidence met the requirements set forth in *Anderson v. Creighton*, 483 U.S. 635 (1987) in that they were relevant and particularized.

Contrary to petitioners' claims, a review of both of the lower courts' inquiries into the qualified immunity defense as it pertains to allegations of the use of excessive force amply demonstrates that the prohibition against the

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[2] In their motion for summary judgment, petitioners did not contend that one's right to be from the use of excessive force under the Fourth Amendment was not clearly established at the time of the incident.

use of the same was clearly established law at the time of the arrest at issue, both in the Sixth Circuit and throughout the nation.

The Supreme Court in the case of *Graham v. Connor*, 490 U.S. 386 (1989), set forth the standard under which excessive force claims are to be analyzed. It was this standard that the District Court and the Court of Appeals applied to the facts in this case which resulted in the denials of petitioners' motion for summary judgment on the basis of qualified immunity, *viz.*, "whether the record contains evidence that petitioners' conduct rose to such a degree that the reasonable official would have known that what plaintiffs were doing violated J. Senk's clearly established right to be free from the use of excessive force." Appendix at 6a, 20a.

It has long been established that the use of excessive force violated some constitutional right, but until *Graham*, precisely what right was violated had not been clarified by the Supreme Court. The *Graham* Court's conclusion that the Fourth Amendment governs all uses of force against persons at liberty follows from its decision in *Tennessee v. Garner*, 471 U.S. 1 (1985). The *Garner* decision held that the use of deadly force to apprehend a fleeing suspect who did not appear to be armed or otherwise dangerous violated the suspect's rights under the Fourth Amendment in that such use of force constituted an unreasonable seizure of his person. In *Graham* the Court simply extended that proposition beyond deadly force cases to *all* excessive force cases where the victim is at liberty. That standard was properly cited and relied upon by the Court of Appeals in its decision. *See* Appendix at 6a. It is therefore clear that the court was correct in finding that Joseph Senk had a clearly established right on the evening of his arrest to be free from the use of

excessive force by the police officers under the Fourth Amendment to the Constitution. Appendix at 6a, 7a; *See also* Appendix at 20a.

The Supreme Court also settled in *Graham* the question of what analysis should be employed to determine whether a given level of force is unconstitutionally excessive. Noting that "[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application . . . ", it provided the following instruction:

> . . . its proper application requires careful attention to the facts and circumstances of each particular case including the severity of the crime, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.

Graham, 490 U.S. at 396

In light of these principles, the lower courts in this case thoroughly evaluated all the testimony and exhibits that were presented by the parties for review on the issue of qualified immunity. Indeed, the District Court devoted nearly six full pages in the background section of its Order to a discussion of the versions of fact and the Court of Appeals devoted an additional four. *See* Appendix at 11a-16a and 2a-6a, respectively. It is therefore apparent that both courts were mindful of their duty to pay careful attention to the particularized and relevant facts and circumstances of the case and the same were given appropriate consideration in the analyses.

Following the required review of the facts and circumstances then, the lower courts were next obligated under the *Graham* standard to ascertain whether the conduct of the officers was objectively reasonable. *See*

Graham v. Connor, 490 U.S. 386, 396 (1989); Appendix at 6a, 22a.

In determining whether the force used in a given instance was reasonable under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the suspect's Fourth Amendment interests against the countervailing governmental interests at stake. When the governmental interests in using force are weak or nonexistent though, as here, even a slight injury may be sufficient to establish a Fourth Amendment violation. *See Molton v. City of Cleveland*, 839 F.2d 240 (6th Cir. 1988); *Lewis v. Downs*, 774 F.2d 711 (6th Cir. 1985).

The *Graham* Court further stated that the reasonableness of the conduct must be judged from the perspective of a reasonable police officer on the scene, not based on hindsight, and should take into account the fact that police officers are often forced to make split-second judgments about the amount of force that is necessary in a particular situation. *Graham*, 490 U.S. at 396.

Contrary to the petitioners' characterizations, the review in this matter was very much unlike that of the Eighth Circuit that was overturned in the case of *Anderson v. Creighton*, 483 U.S. 635 (1987). In *Creighton* the Court held that the Court of Appeals misapplied the standard for determining qualified immunity because its discussion "consisted of little more than an assertion that a general right *Anderson* was alleged to have violated . . . was clearly established." The Court went on to point out that the lower court refused to consider the argument that it was not clearly established that the circumstances surrounding the warrantless search did not constitute probable cause and exigent circumstances. *Creighton*, 483 U.S. at 640-41.

Unlike the Eighth Circuit Court of Appeals decision in the *Creighton* case, the lower courts in this case did in fact consider Petitioners' argument that their alleged actions were not clearly established at the time of the incident. What they ignore in their argument is the point that was made by the courts below that before a determination of objective reasonableness can be made about the conduct of the police, the issue of *what* force was used must first be settled with some degree of certainty. Even then, something definitive about the circumstances must be resolved as well before any conclusions can be drawn as to *why* force was used. Then, and only then, can a determination be made as to whether the amount of force was objectively reasonable.

In their rulings, the District Court and the Court of Appeals concluded after the required review of the facts that they could not judicially determine whether the conduct of the police in the arrest of Joseph Senk was objectively reasonable because of the conflicting versions. *See* Appendix at 7a, 23a. These two rulings were in accord with the Supreme Court's holding previously cited that "There is no requirement that the trial judge make findings of fact. The inquiry performed is the threshold inquiry of determining whether there is the need for a trial – whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Liberty Lobby, Inc.*, 477 U.S. at 250.

After even a cursory review of the record it becomes apparent that there are many, many genuine and relevant factual disputes about what occurred during the course of the arrest and detention of Joseph Senk on May 12, 1990

that relegate against the making of a judicial determination of reasonableness. To be sure, the totality of the circumstances reasonably known to the police immediately prior to the arrest of Mr. Senk are in dispute and unsettled as well.

With respect to the conduct of petitioner David Calhoun alone, there is a significant controversy as to what provoked the force that he used on Joseph Senk while Senk was in the police cruiser. The parties further disagree as to whether the suspect was handcuffed at the time. Petitioner Calhoun, of course, denies that he clubbed the respondent repeatedly and violently on the head as he is accused of doing. Calhoun allows only that he hit Senk on the arm with his flashlight. Thus, genuine and material questions remain unanswered about exactly what force was used on Joseph Senk at the time that he was in the cruiser.

Even if the issues were settled as to the level of force and where it was applied by officer Calhoun, an additional issue of fact is widely in dispute about what provoked such force. Petitioners Calhoun and Dalzell each claim that their lives were threatened by the respondent. Alternatively, Joseph Senk adamantly denies that he threatened their lives in any manner and his testimony was corroborated by a witness.

The District Court and the Court of Appeals were also unable to make a determination about whether it was objectively unreasonable, as respondents claim, for four police officers to pull the handcuffed suspect through the door of the cruiser, hold him firmly and punch him for several minutes where his only resistance was described by the police as "thrashing". The version

offered by the police is that Mr. Senk was never on his feet as he was immediately directed to the ground from the broken window of the cruiser. They offer no explanation for the fact that his chest was not shredded with cuts from the broken glass, though. Nor do they admit that his chest was bruised from punches.

Finally, no determination was possible concerning the claimed unreasonableness of the events that occurred on the ground during the arrest. If the Court were to choose and adopt respondents' version that the blows from the flashlight to Joseph Senk's head while in the cruiser were so severe that he not only sustained brain damage, but that his optic nerves were destroyed as well, it follows that at the time that he was later held on his back by four officers he was blind, in severe pain, semi-lucid and suffering brain damage. Query whether any court under any standard could deem it then reasonable for a 220 pound officer to thrust her knee repeatedly into the person's chest and choke him in this condition with a nightstick until he became unconscious, as respondents' evidence establishes. It should be added parenthetically that officer Chris Calhoun not only denies choking him, she also refuses to admit that she even *had* a nightstick on her person during the incident.

The police, on the other hand, refuse to acknowledge any of the foregoing facts and admit only that "no petitioner used a gun or knife against Joseph Senk." Petition at 25. Because of that, their argument goes, "*Tennessee v. Garner* does not constitute 'clearly established law' supporting any theory that petitioners used constitutionally excessive force against respondent Senk." *Id.*

To be sure, the respondents recognize that not every push or shove, no matter how unnecessary it may later

seem, violates the Fourth Amendment. *Graham*, 490 U.S. at 396. Unquestionably, a police officer's right to make an arrest carries with it the right to use some degree of physical coercion. *Id.*

In this case, however, there was a literal wealth of competent testimony and medical evidence in the record before the District Court and the Court of Appeals to establish that the petitioners employed levels of force on three separate occasions that were wholly excessive and unreasonable under the circumstance where little, if any, physical force was in fact necessary. Practically every material fact asserted by respondents was denied by petitioners. Indeed, there are so many genuine issues of material facts in the record that the court aptly termed the differences as "radically opposed". Appendix at 11a.

Returning to the standard of review that is required after assessing the facts and circumstances of the case, it is stated in *Graham* that the court must next attempt to ascertain whether the conduct of the officers was objectively reasonable. *See Graham*, 490 U.S. at 396; Appendix at 6a, 22a. Because neither of the lower courts in this case were able to reconcile or choose between the two diametrically opposed versions of fact to make an objective determination of what a reasonable officer would have done in similar circumstances, they properly concluded that the case must go to trial. This decision was explained by the Court of Appeals as follows:

> In *Yates v. City of Cleveland*, 941 F.2d 444 (6th Cir. 1991), we held that the standard for determining qualified immunity in excessive force cases is the general standard set forth in *Anderson v. Creighton*, 483 U.S. 635 (1987): "whether an objectively reasonable officer" would believe

> that the conduct in question was lawful. *Yates*, 941 F.2d at 445-47. If the level of force used by the officers was necessary to remove a threat to their safety, for example, or was necessary to avoid the use of lethal force, a grant of qualified immunity would be appropriate. *See, Russo v. City of Cincinnati*, 953 F.2d 1036, 1044-45 (6th Cir. 1992); *Brandenburg v. Cureton*, 882 F.2d 211, 215 (6th Cir. 1989). Immunity would doubtless be appropriate here if it were undisputed that the facts were as claimed by the officers. If the Senks' version of facts is correct, however, the officers who are accused of using excessive force would clearly not be entitled to qualified immunity. In this case, as in *Brandenburg*, 882 F.2d at 216, "the legal question of qualified immunity is completely dependent upon which view of the facts is accepted by the jury." Summary judgment based on qualified immunity is therefore inappropriate. *Yates*, 941 F.2d at 447.

The District Court made a similar finding. *See* Appendix at 22a-23a. It was in this second level of review, therefore, that the courts below found that such determinations could not be made because of the "sharp conflict in the evidence". Appendix at 6a.

In summary, it is conclusive that not only did both of the courts below follow the correct approach in evaluating the petitioners' claim of entitlement to the doctrine of qualified immunity, they also correctly found that Joseph Senk had a clearly established constitutional right on the evening of his arrest to be free from the use of excessive force by the officers. And, contrary to the petitioners' claims otherwise, such findings were well supported with allegations and facts that were particularized and relevant to those issues. Accordingly, neither the facts of this

case nor the arguments raised in Part II of their Argument give rise to the allegedly unique issues that petitioners propose for review by this Court.

III. THE STANDARDS SET FORTH IN THE CASES CITED BY PETITIONERS DO NOT APPLY TO THE FACTS OF THIS CASE.

Petitioners begin Part III of their Argument by asserting that police officers should be afforded the protection of qualified immunity in instances where the level of force was reasonable, albeit mistakenly used. In support, they rely on the case of *Hunter v. Bryant*, 112 S.Ct. 534 (1991). For the reasons that follow, however, it is clear that the decision in *Hunter* is not applicable to the facts of this case.

First, in *Hunter* the facts and circumstances were well settled. As a result, the Supreme Court was able to judicially determine that although probable cause for the arrest was lacking, the officers' conduct was nevertheless reasonable under the circumstances.

Unlike the *Hunter* case, however, virtually all of the material facts and circumstances surrounding the arrest of Joseph Senk in the instant case are widely in dispute. Indeed, the officers in this case refuse to acknowledge that they used anything but minimal force during the course of the arrest. Moreover, they insist that two of the officers' lives were threatened. Respondents, on the other hand, deny that any threats were made and they further maintain that Joseph Senk was severely beaten and choked following only minimal resistance.

Further, and contrary to the decision of the Ninth Circuit in the *Hunter* case that was overturned, the Sixth

Circuit in the case at bar explicitly recognized that immunity should ordinarily be decided by the court and it also applied the correct rule in its determination of the issue; "the standard for determining qualified immunity in excessive force case is the general standard set out in *Anderson v. Creighton*, 483 U.S. 635 (1987): 'whether an objectively reasonable officer' would believe that the conduct in question was lawful." Appendix at 7a.

In the final analysis in the present case though, the Sixth Circuit Court of Appeals found after a thorough review of the record that is was judicially unable to make a determination of reasonableness because of the "sharp conflict in the evidence". Appendix at 6a. On that basis it held that "only a jury can decide whether the facts are as the officers say they are." *Id.* The ruling under such circumstances was in accord with the Supreme Court's statement that "credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of the judge, whether he is ruling on a motion for summary judgment or for a directed verdict." *Liberty Lobby, Inc.*, 477 U.S. at 255.

It follows from the *Hunter* decision that before a reviewing court can make determinations as to whether the decisions of officers were reasonable and whether mistakes were committed, it must first have reasonably well settled facts available from which to make such assessments. Where the plaintiffs' allegations articulate a violation of clearly established law and there are genuine issues of disputed and material facts, a jury must resolve the question. *See Mitchell*, 472 U.S. 511 (1985). Clearly, the "radically opposed versions of the facts in this case do

not lend themselves to the type of analysis that petitioners propose. Appendix at 11a.

It is next claimed by petitioners under this heading that no clearly established law at the time of the events had defined their conduct with respect to the use of nondeadly force. Petition at 28. This contention, of course, has been addressed earlier herein at length but the principle set forth in *Graham* requires repetition that "*all* claims that law enforcement officers have used excessive force – deadly or not – in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness standard . . . " *Graham*, 490 U.S. at 395 (emphasis in original). Unquestionably, Joseph Senk had a clearly established right on the evening of his arrest to be free from the use of excessive force by the police officers under the Fourth Amendment. The petitioners' assertion to the contrary is therefore patently erroneous.

Finally in their argument that relies on the *Hunter* case, petitioners restate the undisputed standard that courts, and not juries, are to decide the question of objective reasonableness whenever possible. The petitioners do not, however, suggest that the courts below failed to try to comply with the standard. In fact, the District Court explicitly stated in its companion order that recent authority has established that whether a government official is possessed of qualified immunity from Section 1983 suits is a question of law for the court to resolve in the first instance. *See also* Appendix at 20a. The Court of Appeals concurred in this statement of the law and too endeavored to resolve that very question.

In yet another argument under this heading, petitioners alternatively encourage the Court to apply the

approach set forth in *Siegert v. Gilley*, 111 S.Ct. 1789 (1991), to the facts of this case and rule that respondents have failed to allege constitutional violation of their rights. As with the *Hunter* case, the facts in *Siegert* as well simply bear no relationship to the issues here.

Siegert, of course, was an action brought by a former government employee against his previous supervisor for allegedly writing defamatory matter about his job performance. As a result of such conduct, Siegert claimed that he was deprived of his constitutionally protected liberty interest without due process of law. The Supreme Court held that Siegert "failed to satisfy the first inquiry in the examination of such a claim; he failed to allege the violation of a clearly established constitutional right." *Id.* at 1793. Even if his allegations were accepted as true, "[he] did not state a claim for violation of any rights secured to him under the United States Constitution." *Id.* at 1791. In contrast, the respondents herein have properly alleged and documented violations of the constitutional right to be free from the use of excessive government force under the Fourth Amendment to the United States Constitution.

Although it is claimed by petitioners that respondents cannot establish a constitutional violation under either version of facts, it is clear from the vast record that they are mistaken, as both the District Court and the Court of Appeals specifically found after a comprehensive review. After reciting the different versions of fact and the applicable standards, the Court of Appeals concluded by stating that "If Senks' version of the facts is correct, however, the officers who are accused of using excessive force would clearly not be entitled to qualified immunity." Appendix at 7a.

It is readily apparent that the petitioners' various arguments under this heading do not require the Court's

review. Indeed, the two cases relied upon bear no relationship to the facts or issues of this case. Moreover, their allegations that the Senks failed to allege violations of established constitutional rights and that the use of excessive force by police officers was not clearly established are surely without merit.

CONCLUSION

Petitioners brought this action in an effort to obtain protection under the doctrine of qualified immunity for their actions during the arrest of respondent Joseph Senk on May 12, 1990. It was shown that during the course of the arrest Mr. Senk was seriously and permanently injured as a direct and proximate result of the excessive force administered in response to minimal resistance.

Neither the facts of this case nor the previous legal arguments raised by petitioners and considered by the lower courts give rise to the allegedly unique issues petitioners propose for review by this Court.

Because the petitioners' appeal does not raise issues requiring this Court's review, it is respectfully submitted that the Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit should be denied.

Respectfully submitted,

Rex W. Post
113 St. Clair Avenue, Suite 375
Cleveland, Ohio 44114
(216) 696-2118

Attorney for Respondents,
Joseph E. Senk and Patricia A. Senk